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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975
NO. 75-6821

COLORADO CIVIL RIGHTS COMMISSION
and RAYMOND WENDELL HOLMES,

Petitioners,

v.

COLORADO SPRINGS COACH CO., and
BYRON COWART,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

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PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

OPINION BELOW

The opinion of the Colorado Court of Appeals is reported at ___ Colo. App. ___, 536 P.2d 837 (Appendix D).

JURISDICTION

The Colorado Court of Appeals' judgment was entered on March 11, 1975. A petition for rehearing was denied on April 1, 1975. The court of appeals' mandate issued on April 10, 1975. A petition for writ of certiorari from the Colorado Supreme Court was denied on July 7, 1975. Petitioner was granted an extension of time until November 10, 1975 within

which to seek certiorari from this court by order dated September 28, 1975.

Jurisdiction of this court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Does the application of *res judicata* barring determination by the Colorado Civil Rights Commission of claims of employment discrimination deny due process to petitioner Holmes and others similarly situated?

2. Does the application of *res judicata* discriminate on the basis of wealth against petitioner Holmes and others similarly situated by unreasonably burdening their right to seek relief from the Colorado Civil Rights Commission?

3. Does the application of *res judicata* barring determination by the Colorado Civil Rights Commission of claims of employment discrimination deprive petitioner Holmes and others similarly situated of federal rights under Title VII of the Civil Rights Act of 1964?

CONSTITUTIONAL PROVISION

AMENDMENT XIV

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

The statutes primarily involved are the Colorado Antidiscrimination Act of 1957, C.R.S. 1973, 24-34-301 *et seq.*; the Colorado Employment Security Act, C.R.S. 1973, 8-70-101 *et seq.*,

and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. The relevant portions of the statutes are appended hereto (Appendix E).

STATEMENT OF THE CASE

Petitioner, Raymond Wendell Holmes, was employed by the Colorado Springs Coach Company from July, 1969 to March, 1970, and from August, 1970 to on or about February 15, 1971, when he was terminated by the company "for failure to work assigned runs." (Transcript, Civil Rights Commission Hearing, Vol. I, pp. 21, 37; Complainant's Exhibit 5). Subsequent to his termination, Holmes filed a claim with the Industrial Commission of Colorado (serving ex officio as the Unemployment Compensation Commission of Colorado) for unemployment compensation benefits. A decision by a deputy denied Holmes' claim. On appeal, a hearing was held before a referee. Holmes attempted to introduce evidence in support of his allegation that his discharge was the result of racial discrimination, but the referee refused to admit evidence on that issue. (Transcript, Vol. I, pp. 44,62; Respondent's Exhibit 4, pp. 6,8,16). A "no-award" decision was given, which was subsequently upheld by the Industrial Commission (Appendix A; Transcript, Vol.II, pp. 218, 220; Respondent's Exhibit 3).

On March 30, 1971, Holmes filed a complaint with the Colorado Civil Rights Commission, charging that his termination from employment was due to racial discrimination. A "Notice of Hearing" was issued, and a hearing was convened on September 15, 1975. The question as to whether the prior "no-award" determination by the Industrial Commission barred a decision by the Civil Rights Commission on the allegation of racial discrimination was raised by the hearing officer. (Transcript, Vol.I, p.5). Petitioner responded in a "Memorandum of Commission" that an individual "should not be deprived of a full hearing" in one forum as a result of having sought relief first in the other. The memorandum concluded that to deny Holmes the right to pursue his remedies under the Colorado Antidiscrimination Act

of 1957 would "deny him a basic statutory and constitutional right." (Memorandum of Commission, pp. 1,7).

On September 24, 1973, the hearing officer issued an "Initial Decision" (Appendix B), in which he found that the determination of the Industrial Commission awarding no benefits to Holmes did not bar a decision by the Civil Rights Commission on the charge of racial discrimination. On the merits, the officer ruled that Holmes was terminated from employment as a bus driver with Colorado Springs Coach Co. because of his race (Negro) and color (Black) and ordered his reinstatement with back pay. The hearing officer's decision automatically became the decision of the Civil Rights Commission after the expiration of 30 days. C.R.S. 1973, 24-4-105(14).

The District Court of El Paso County set aside the decision of the Civil Rights Commission on the ground that the proceedings before the Commission were barred under the doctrine of *res judicata* by the earlier determination by the Industrial Commission (Appendix C).

On appeal to the Colorado Court of Appeals, petitioner Holmes again argued that "persons availing themselves of these forums [the Industrial Commission and the Civil Rights Commission] are entitled to the full protection of each of these bodies and a full hearing before them." (Opening Brief, p.4). Petitioner emphasized the importance to the poor of unemployment benefits on the one hand, and the fundamental nature of the rights sought to be vindicated before the Civil Rights Commission on the other. (Opening Brief, pp.7, 12). The court of appeals affirmed the judgment of the district court on March 11, 1975, holding that the doctrine of *res judicata* barred the Civil Rights Commission from hearing the charge of racial discrimination (Appendix D). Holmes' petition for rehearing was denied on April 1, 1975.

On petition for writ of certiorari from the Colorado Supreme Court, Holmes sought relief from the "unconscionable choice"

presented to a discharged employee, as a result of the court of appeals' decision, between relief from the economic hardship of unemployment and freedom from racial discrimination, and asserted that the denial of a hearing before the Civil Rights Commission deprived him of "due process." (Petition for Writ of Certiorari, pp.5, 13). The Colorado Supreme Court denied his petition on July 7, 1975.

ARGUMENTS AND REASONS FOR GRANTING THE WRIT

I.

APPLICATION OF *RES JUDICATA* BARRING DETERMINATION BY THE COLORADO CIVIL RIGHTS COMMISSION OF CLAIMS OF EMPLOYMENT DISCRIMINATION DENIES DUE PROCESS TO PETITIONER HOLMES AND OTHERS SIMILARLY SITUATED.

Only twelve years have passed since this court was required to overrule a decision of the Colorado Supreme Court restricting the jurisdiction of the Colorado Antidiscrimination Act of 1957. In *Colorado Antidiscrimination Commission et al v. Continental Airlines, Inc.*, 372 U.S. 714 (1963), the court rejected the state supreme court's holding that the act did not apply to interstate carriers. Justice Black, writing for a unanimous court, emphasized at p. 717:

> The obvious importance of even partial invalidation of a state law designed to prevent discriminatory denial of job opportunities prompted us to grant certiorari.

Once again, we ask the court to grant certiorari to review a state appellate court decision which radically limits the jurisdiction of the Colorado Antidiscrimination Act of 1957.

While the *Continental* case involved the Antidiscrimination Commission's (now, the Colorado Civil Rights Commission)

jurisdiction over a class of employers, the present case concerns its jurisdiction over complaints of discriminatory discharge from employment. The court below held that the denial of unemployment compensation by the Industrial Commission is *res judicata* on the issue of whether the discharge resulted from racial discrimination and the Civil Rights Commission is barred from determining that issue in a subsequent proceeding. The court reached that result even though petitioner Holmes was denied the opportunity to be heard on the issue of race discrimination by the Industrial Commission and his proffered evidence of discrimination was rejected as irrelevant.

We submit that the issues raised by this petition are of equal importance to those decided in the *Continental* case. The decision of the Colorado Court of Appeals denies due process, as defined in the Fourteenth Amendment, to Holmes, and others similarly situated, in the following manner:

First, the novel application of *res judicata* by the appellate court denied Holmes the opportunity to be heard on his claim of racial discrimination before either the Industrial Commission or the Civil Rights Commission.

Second, the decision in this case was an abrupt departure from established state procedure for adjudicating claims of discriminatory discharge. Because Holmes could not have foreseen this result, it is a denial of due process to hold that he waived his remedy under the Antidiscrimination Act by following the statutory procedures for processing both his unemployment compensation and discrimination claims.

Third, where the legislature has established an agency with expertise in employment discrimination and has given it adjudicatory powers, Holmes is denied his right to a "fair trial" before a "fair tribunal" if he is required to litigate his discrimination complaint before another agency which lacks such expertise.

Each issue will be considered in the order presented.

A. *Holmes was denied the opportunity to be heard.*

The statement of facts set forth above shows that Holmes first filed a claim for unemployment compensation which was initially denied. At his appeal of the initial denial, Holmes asserted that he had been wrongfully discharged because of his race, but his evidence of discrimination was rejected as not relevant to his unemployment compensation claim. He then proceeded to the Civil Rights Commission where his claim of discrimination was heard and decided in his favor.

Under the court's ruling, however, the hearing before the Civil Rights Commission was improper. Holmes' remedy, according to the court, would have been to seek judicial review of the unemployment compensation examiner's refusal to hear his evidence of race discrimination. The time for seeking such judicial review had long since expired when the court's decision was issued, and thus, Holmes was denied any hearing on his claim.

Colorado has guaranteed to its citizens the right to be free from racial discrimination in the various phases of employment, including discharge. C.R.S. 1973, 24-34-306(a). Elimination of racial discrimination in employment is "one of the most cherished aims in American feeling." *Railway Mail Association v. Corsi*, 326 U.S. 88, 98 (1945) (Frankfurter, J. concurring). Having guaranteed this right to petitioner Holmes, the state cannot deprive him of his right without due process of law. At the very least, Holmes was entitled to notice and a hearing. *Goss v. Lopez*, 419 U.S. 565 (1975).

We submit that basic due process was denied to Holmes under the rationale of *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673 (1930). In *Brinkerhoff*, the state supreme court repeatedly had construed a certain remedy as appropriate. A later ruling that the remedy could be had only after exhaustion of administrative remedies (no longer available due to the

statute of limitations) was held to violate due process in the primary sense of the denial of the opportunity to be heard. See also *Friederichsen v. Reynard*, 247 U.S. 207, 213 (1918).

B. *Holmes did not knowingly waive his right to be heard.*

Holmes' action in pursuing separate claims with respect to unemployment compensation and employment discrimination was clearly reasonable. Prior to the decision in this case, the two statutes were seen as complementary: unemployment compensation provided short term subsistence relief while a favorable decision in a discrimination action could result in reinstatement and back pay. Holmes, of course, is not an attorney and pursued his complaints *pro se*. But even if he had had counsel, the existing state of the law would not have warned him. Indeed, the one relevant Colorado case, a trial court decision, had held that prior arbitration did not bar submission of the same claim to the Civil Rights Commission. *Adolph Coors Co. v. Colorado Civil Rights Commission et al*, 5 FEP Cases 254 (1971).

At the proceedings on his unemployment compensation claim, no one advised Holmes that he was waiving his rights under the Antidiscrimination Act. In fact, the ruling rejecting his claim of discrimination can be construed as a contrary advisement. Thus, Holmes proceeded on the understanding that his discrimination complaint would be heard by the Civil Rights Commission. The court of appeals implies that Holmes waived his right to a hearing when he did not appeal the ruling in his unemployment compensation case, but Holmes' inaction surely was not an effective waiver.

To be effective, a waiver of due process rights must be made with knowledge and understanding of the consequences of such action. *Fuentes v. Shevin*, 407 U.S. 67 (1972). *See also Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (requiring "an intentional relinquishment or abandonment of a known right or privilege" in a criminal case regarding right to counsel). In this case, Holmes clearly lacked the knowledge and understanding

to waive his right to a hearing. The contrary conclusion reached by the court of appeals cannot stand.

C. *In this context, a "fair trial" before a "fair tribunal" requires a hearing under the Colorado Antidiscrimination Act of 1957.*

As this court has often said, the due process hearing requirement is a flexible concept and the nature of the hearing depends "on appropriate accommodation of the competing interests involved." *Goss v. Lopez, supra*. The minimal due process requirement of a "fair trial" before a "fair tribunal" applies to proceedings before administrative agencies. *Withrow v. Larkin*, ___U.S.___, 95 S.Ct. 1456 (1975).

In the area of employment discrimination, we submit that the state legislature has defined what constitutes a "fair trial" before a "fair tribunal" by enacting the Colorado Antidiscrimination Act of 1957 and providing a mechanism for resolving claims before the Civil Rights Commission. The strained application of *res judicata* by the court of appeals results in the denial of a "fair trial" and a "fair tribunal" because the discharged employee is compelled to submit his discrimination claim to an agency with no expertise in employment discrimination, with a very abbreviated hearing procedure and with no authority to order an appropriate remedy if it were to find discrimination had occurred. Although the decision suggests a race between the two agencies to decide the discrimination issue, the procedural differences insure that in most, if not all, cases the first determination will be made on the unemployment compensation claim.

A brief review of the two statutes will illustrate the differences in the hearings provided by the two agencies. The Colorado Civil Rights Commission receives complaints, investigates, makes a finding of probable cause and attempts to conciliate the complaint. If conciliation fails, the matter is heard in a trial-type hearing with a commission attorney representing the complainant. C.R.S. 1973, 24-34-307. The commission may issue a cease and desist order and may order appropriate relief including affirmative action,

back pay, reinstatement or promotion. *Id.* Judicial review of the commission's order may be sought in the appropriate district court. C.R.S. 1973, 24-34-308.

The unemployment compensation law emphasizes the need for a speedy determination of eligibility. An initial determination of eligibility may be appealed within the agency to a referee and reviewed by the Industrial Commission. C.R.S. 1973, 8-74-102, 104, 105. Although the act requires a "fair hearing" before the referee, no trial-type hearing is guaranteed nor is counsel provided to the complainant. The referee's decision is subject to judicial review by the court of appeals on an accelerated calendar and review is "in a summary manner." C.R.S. 1973, 8-74-109. Benefits available under this act are limited to weekly payments.

The pertinent inquiry in an unemployment compensation claim is whether the claimant became unemployed "through no fault of his own," and the act specifies factors which will result in either no award or a limited award to a claimant. C.R.S. 1973, 8-73-108. These disqualification standards are unusually stringent and the resultant rate of disqualification for unemployment compensation in Colorado is among the highest in the United States. In 1974, Colorado had the third highest rate of disqualification among the states; 68.8 claimants per 1,000 sampled were denied by Colorado compared to 26.0 per 1,000 sampled in the nation as a whole. U.S. Department of Labor, Manpower Administration, *Unemployment Insurance Statistics*, Table 13 "Denials of Benefits Under State Programs By Issue, January-December 1974."

Given these standards for disqualification, it would not be inconsistent to find both that an individual had been discharged because of his race and that he was ineligible for award on other grounds. In that case, evidence of discrimination may be irrelevant to determining eligibility.

Implicit in the decision now at issue is the court's assumption that unemployment compensation officials are competent to

decide cases of racial discrimination. That assumption cannot stand in the face of the legislative declaration vesting that authority in the Civil Rights Commission. Thus, we submit that the legislature has balanced the competing interests and devised an adjudicatory process which provides substantial protections to the complainants in employment discrimination cases. The court below denied the due process rights of Holmes and other complainants by relegating them to a truncated procedure before agency officials with no expertise in employment discrimination.

II.

APPLICATION OF *RES JUDICATA* DISCRIMINATES ON THE BASIS OF WEALTH AGAINST PETITIONER HOLMES AND OTHERS SIMILARLY SITUATED BY UNREASONABLY BURDENING THEIR RIGHT TO SEEK RELIEF FROM THE COLORADO CIVIL RIGHTS COMMISSION.

Petitioner Holmes and others similarly situated are discriminated against on the basis of wealth as a result of the court of appeals' application of the doctrine of *res judicata*. Although the court of appeals' ruling ostensibly allows an employee who claims he was discharged because of racial discrimination to pursue his remedies before either the Civil Rights Commission or the Industrial Commission, both economic necessity and the regulatory scheme compel him to seek relief from the Industrial Commission. The court effectively has forced the discharged employee to choose between two rights provided by the state. If he chooses to vindicate his civil rights, he can do so only at the very high cost of surrendering his subsistence payments under unemployment compensation. Clearly this is a choice available only to those who have sufficient financial resources to forego unemployment compensation. Conditioning an important right, such as the right to be free from racial discrimination, on the financial resources of the claimant violates the Equal Protection Clause and denies substantive due process.

Lines drawn on the basis of wealth are traditionally disfavored. *Harper v. State Board of Elections*, 383 U.S. 663 (1966). This is so even where no explicit classification on the basis of wealth has been made. Thus in *Harper, supra*, the imposition of a poll tax on all voters, which had the practical effect of discriminating against those voters who could not afford to pay the tax, was invalidated as a violation of equal protection. Similarly, in the instant case, the court of appeals' ruling has the effect of denying those discharged employees who cannot afford to forego their right to seek unemployment benefits the right to pursue their remedies under the Colorado Antidiscrimination Act of 1957.

Consequently, the quality of the hearing which the discharged employee obtains depends upon his wealth. Prior rulings of this court indicate that such discrimination violates the Equal Protection Clause.

As this court stated in *Griffin v. Illinois*, 351 U.S. 12, 19 (1956), "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." In *Griffin, supra*, this court held that the Equal Protection Clause was violated where the poor were denied adequate appellate review because they were unable to afford to order trial transcripts. In *Douglas v. California*, 372 U.S. 353, 356 (1963), where an indigent's right to appointed counsel on appeal was upheld, this court stated:

> . . . [In California] the type of an appeal a person is afforded in the District Court of Appeals hinges upon whether or not he can pay for the assistance of counsel. If he can, the appellate court passes on the merits of his case only after having the full benefits of written briefs and oral argument by counsel. If he cannot, the appellate court is forced to prejudge the merits of his case before it can even determine whether counsel should be provided.[1]

[1] The California rule required the appellate court to review the record in order to decide whether or not to appoint counsel.

In the instant case, the discharged employee who is without means must submit to the abbreviated procedures of the Industrial Commission, where he will be without counsel and will not be entitled to the full hearing provided by the Colorado Antidiscrimination statute.

Although petitioner and others similarly situated could conceivably seek redress of their grievances in the federal courts, this does not remove the state's obligation to avoid discriminating against them because of their indigency. In *Smith v. Bennett*, 365 U.S. 708, 713 (1961), this court struck down an Iowa law which required a prisoner seeking a writ of habeas corpus in state court to pay a filing fee. The court remarked that it would "ill-behoove" the state of Iowa to send indigent prisoners to federal court to seek enforcement of their rights.

The right to be free from racial discrimination, which petitioner seeks to assert before the Colorado Civil Rights Commission, is one of the most basic guarantees of our Constitution. *Brown v. Board of Education*, 347 U.S. 483 (1954). Thus, legislative classifications based on race have been considered inherently suspect and have been subjected to the closest judicial scrutiny in order to determine whether compelling state interests justified such distinctions. Moreover, this court has zealously protected persons engaged in seeking the redress of racial grievances. See *NAACP v. Button*, 371 U.S. 415 (1963). So, in the instant case, where the right sought to be vindicated is freedom from racial discrimination, this court should look closely at the reasons for subjecting petitioner and others similarly situated to a different treatment because of their poverty than would be afforded to those of more ample means. The apparent justification for the application of the doctrine of *res judicata* is one of judicial economy. Such a purpose, although legitimate in its proper sphere, cannot be used to deny a fair hearing to the financially disadvantaged who claim that their discharge from employment was the result of racial discrimination.

This court has also invalidated burdens on the exercise of important rights under the Due Process Clause. Thus in *Boddie v. Connecticut*, 401 U.S. 371 (1971), a Connecticut requirement of payment of court fees and costs to file for divorce was struck down because it restricted the access of the poor to the divorce courts solely on the basis of their indigency. As Justice Brennan pointed out in his concurring opinion to *Boddie*, *supra*, the issue, which the majority treated as one of due process, inevitably involved considerations of equal protection as well. Similarly, in *Lindsey v. Normet*, 405 U.S. 56 (1972), this court held that the requirement that a tenant post a double bond on appeal from an adverse judgment in a forcible entry and detainer action heavily burdened the tenant's right to appeal and was particularly discriminatory against the poor, and therefore violated the Equal Protection Clause.

The effect of the application of the doctrine of *res judicata* in the instant situation is to preclude discharged employees who lack financial means from obtaining an adjudication of alleged civil rights violations before the Colorado Civil Rights Commission. They are therefore denied the full hearing provided for such claims by the Colorado Antidiscrimination Act of 1957. Moreover, the application of *res judicata* unreasonably burdens their right to assert their claims of racial discrimination. Such treatment, arbitrarily imposed upon the petitioner and others similarly situated solely because of their wealth, finds no justification in any meaningful state interest, and therefore denies them the equal protection of the laws.

III.

APPLICATION OF *RES JUDICATA* BARRING DETERMINATION BY THE COLORADO CIVIL RIGHTS COMMISSION OF CLAIMS OF EMPLOYMENT DISCRIMINATION DEPRIVES PETITIONER HOLMES AND OTHERS SIMILARLY SITUATED OF FEDERAL RIGHTS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

Under the scheme of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(c), the Federal Equal Employment Opportunity Commission must defer jurisdiction to a state agency with expertise and similar enforcement power for 60 days or until action by the state is terminated, whichever is earlier.[2] After this deferral period, the federal and state agencies have concurrent jurisdiction. The Colorado Civil Rights Commission has qualified as a deferral agency under this provision. Under Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b), the federal agency is required to "accord substantial weight to the final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements under [subsection] (c)." Generally, the federal agency defers all action until the state has completed its proceedings.

Because these provisions authorize concurrent jurisdiction of matters which would otherwise be adjudicated in federal court, the state court should have upheld the jurisdiction of the Civil Rights Commission in order to protect petitioner's federal rights. When concurrent jurisdiction exists, the state court is generally required to adjudicate the federal action. *Testa v. Katt*, 330 U.S. 386 (1947); *Claflin v. Houseman*, 93 U.S. 130 (1876); *Mondou v. New York, N.H. & H R. Co.*, 223 U.S. 1 (1912).

This court has held that application of principles such as *res judicata* and collateral estoppel is inappropriate in the sensitive area of employment discrimination. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49 nn.10 & 11 (1974). The Sixth Circuit stated the prevailing rule in *Tipler v. E. I. duPont de Nemours and Co.*, 443 F.2d 125, 128-9 (6th Cir. 1971), which involved the application of the doctrine of *res judicata* to a claim of discrimination which was first raised before the National Labor

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[2] The federal agency, under contract to coordinate efforts and to conform state procedures and standards to the requirements of Title VII, provides substantial federal funding to the state agency.

Relations Board and later before the Equal Employment Opportunity Commission, as follows:

> Despite the possible applicability of these doctrines [*res judicata* and collateral estoppel] to administrative decisions, in the instant action it would be inappropriate to apply either. The issue here is whether appellee's dismissal was in violation of Title VII of the Civil Rights Act of 1964. The NLRB decision, on the other hand, dealt with the alleged violation of the National Labor Relations Act. Although these two acts are not totally dissimilar, their differences significantly overshadow their similarities. [citations omitted] Absent a special consideration a determination arising solely under one statute should not automatically be binding when a similar question arises under another statute. [citations omitted] This is because the purposes, requirements, perspective and configuration of different statutes ordinarily vary.

The "purposes, requirements, perspective and configuration" of the Colorado Employment Security Act, which provides temporary unemployment compensation, and the Colorado Antidiscrimination Act of 1957, which provides Title VII protections against discrimination, clearly differ. Therefore, in order to protect Title VII charging parties' federal rights to a hearing and remedy before the state deferral agency, the principle of *res judicata* should not be applied.

The Colorado Antidiscrimination Act of 1957 is the only Colorado statute which provides remedies, including cease and desist orders, against discrimination in employment, and it is enforceable solely through the Colorado Civil Rights Commission. Under the court of appeals' decision, when a victim of an alleged discriminatory discharge seeks unemployment compensation, the state may no longer enforce the Antidiscrimination Act against the employer. Figures compiled by the Colorado Civil Rights Commission for fiscal year 1975 show that 63%

of the employment complaints received by the Commission were discharge cases. The effect of the court of appeals' decision therefore is to nullify nearly two-thirds of all state enforcement procedures against employment discrimination. Such acquiescence by the state in discrimination prohibited by federal law is clearly invalid. See *Reitman v. Mulkey*, 387 U.S. 369 (1967). Moreover, the "obvious importance of reviewing even partial invalidation of a state law designed to prevent the discriminatory denial of job opportunities" is even greater here than in *Continental Airlines*, *supra* at 717, because the state procedure is an integral part of the protection of federal rights.

CONCLUSION

For the reasons stated, petitioner respectfully requests that a writ of certiorari be granted to review the judgment of the Colorado Court of Appeals.

Respectfully submitted,

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Appendix A

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO
(EX-OFFICIO UNEMPLOYMENT COMPENSATION COMMISSION OF COLORADO)

DD 5496-71
RD 6124-71
IC 4659-71

In the Matter of:

Claimant: *Raymond Wendell Holmes-SS#* 458-58-4796
424 Placid Road
Colorado Springs, Colorado 80910

Employer: Colorado Springs Coach Company
Post Office Box 1180
Colorado Springs, Colorado 80910

Joslyn Fruit Company
3725 East Boulder
Colorado Springs, Colorado 80909

ORDER OF THE COMMISSION
AFFIRMING DECISION OF THE REFEREE

The above mentioned appeal was considered this 10th day of June, 1971. The Commission having examined the records in this case, including all of the documents, papers, and transcript of the testimony taken at the hearing in this matter, FINDS:

That the Findings of Fact of the Referee are supported by competent and substantial evidence and that the decision of the said Referee was made in accordance with the law.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED That the Findings of Fact and the Decision

of the Referee in this matter shall be deemed to be the decision of the Industrial Commission of the State of Colorado (Ex-Officio Unemployment Compensation Commission of Colorado).

This decision shall become final unless within ten (10) days from the date of mailing a Petition to Review the same is filed in the Local Employment Service Office, or with the Division of Employment, 1210 Sherman Street, Denver, Colorado 80203.

INDUSTRIAL COMMISSION OF COLORADO
(Ex-Officio Unemployment Compensation
Commission of Colorado)

(s) Albert S. Mangan

(s) Chester L. Hoskinson

Commissioners

Date Mailed: June 14, 1971

Appendix B

STATE OF COLORADO
BEFORE THE COLORADO CIVIL RIGHTS COMMISSION

Complaint No. E-460 (71-72)

RAYMOND HOLMES,	)	
	)	
Complainant,	)	
	)	
v.	)	INITIAL
	)	DECISION
COLORADO SPRINGS COACH CO.,	)	
and BYRON COWART,	)	
	)	
Respondents.	)	
	)	

William H. Levis, Attorney-Investigator, Denver, Colorado, for Complainant and the Commission.

Bruce L. Craig, Attorney at law, Colorado Springs, Colorado, for Respondents.

In this case the Complainant alleges that he was discharged by Respondents from his employment as a bus driver for Respondent Colorado Springs Coach Co. (referred to as the "Coach Company") by reason of his race and color.

Hearing commenced on September 15, 1972, and was interrupted while Respondents sought judicial relief with respect to one issue discussed herein. The hearing resumed and was concluded on March 16, 1973. Except for recognition of the purely formal documents of record which were introduced at the initial hearing, this case will be treated as having been heard *de*

novo on March 16, 1973, on which date Respondents were at all times present and represented by counsel.

Decision will enter in part for Complainant and in part for Respondents as set forth herein.

I. RES JUDICATA

Respondents say that a decision of the Industrial Commission awarding no grant of unemployment benefits to Complainant is res judicata of the issues presented in this case.

The Commission responds that the Industrial Commission has no authority nor jurisdiction to determine whether an individual was discharged by reason of discrimination, so that issue is left for determination by the Commission.

This issue has now been repeatedly determined by the Commission and the several courts adversely to the position of Respondents. We consider ourselves bound by those rulings. If Respondents are to pursue their contentions concerning res judicata, it must be on appeal.

II. THE MERITS

The decision on the merits is rather simple. When the evidence discloses disparate treatment of employees of different races, and there is no reasonable explanation for the different treatment, discrimination at the very least may be inferred. Perhaps better put, when there is disparate treatment of persons depending upon their respective races or colors, that is discrimination.

That is the case here in two respects.

First, the uncontradicted evidence shows disparate treatment in the manner of disciplining and terminating drivers for failure to report for work. Apparently, from Complainant's Exhibit 7, it is not atypical for personnel of the Coach Company to miss a day of work and, presumably, be replaced for that day by a

standby driver. The evidence discloses that Complainant, a Negro, was late for work on one occasion and missed all or half of a day on four other occasions. During the same period Caucasian driver Edgell missed work or was late on nine occasions before his eventual termination. Caucasian driver was allowed seven missed days before he was terminated, and, unlike Complainant, he was first subjected to the lesser sanction of a three-day suspension before termination. Caucasian employee Winget was also allowed the lesser sanction of suspension in spite of violations of safety rules after warnings and apparent repeated tardiness. Complainant Holmes was terminated with no opportunity for a lesser sanction such as suspension for less grave offenses than the Caucasian drivers. In addition, it was admitted that calls were made to driver Edgell to attempt to secure his attendance; no such calls were made to Complainant. Finally, there apparently is a company policy of suspending wrongdoers for periods of three, six and fifteen days, progressively, before termination. That was not followed in Complainant's case.

Second, it was testified that Respondent Cowart himself investigated each case before an employee was terminated. This investigation, he said, included conversations with any superintendent who recommended discharge, the union and any persons in the shop having knowledge of circumstances of the situation. This investigation did not take place in the case of the discharge of Complainant Holmes. Indeed, there was a joke among a number of workers that Complainant was quitting to work at or attend race tracks, but Mr. Cowart did not even become aware of this joke until some days later.

These disparities clearly involve and are a part of and a cause of the termination of Complainant.

Mr. Cowart testified that in all respects other than being late on the occasions mentioned Complainant was a satisfactory employee.

We find that Complainant Holmes was treated differently than Caucasian employees and that he was discharged as a result of his race and color by the Respondent Coach Company.

There is no sufficient showing whether the calls that were made, the suspensions of other drivers and the like were at the hands of superintendents or Respondent Cowart himself. There is no sufficient showing that he personally was or is in violation of the Act.

III. THE COACH COMPANY'S SUCCESSORS

Complainant Holmes has sought reinstatement, and that relief will be ordered.

There is some question whether that reinstatement can apply to those routes taken over by successors.

We do not believe we can order an organization not a party to this proceeding to do anything.

Complainant cites cases in which a party in privity with another can be bound by the acts of that other. However, those cases are real estate cases dealing with privity of title. This case is different. And in those cases the successor was granted his day in court to say whether or not he should be bound.

In this case, a successor to the Coach Company may or may not be bound by this decision because it has some contractual obligation to be bound by all liabilities of the Coach Company.

A successor may or may not be bound by virtue of some variant of the "successor doctrine" of federal labor law.

A successor may not be bound because the Public Utilities Commission of Colorado has primary jurisdiction.

We express no opinion as to any of these matters.

What we do say is that we will not make any directive, one way or another, to a party who is not before us to express his views. If the Complainant contends that some successor is bound by operation of law by this decision, that is for another hearing, or for a proceeding before a court, with notice and service upon that party.

CONCLUSION

In addition to the preceding findings, we specifically find that:

1. The Commission has jurisdiction of the subject matter of the complaint and has jurisdiction of Respondents.

2. Respondent Colorado Springs Coach Co. terminated Complainant Holmes from his position as bus driver because of his race and color.

3. There is no sufficient evidence to determine that Respondent Cowart discriminated against Complainant Holmes.

We conclude as a matter of law that Respondent Colorado Springs Coach Co. violated the Act by discharging Complainant Holmes, and that Complainant Holmes is entitled to reinstatement with back pay. The complaint is dismissed insofar as it pertains to Respondent Cowart.

Dated this 24th day of September, 1973.

Theodore M. Smith
Hearing officer

Appendix C

IN THE DISTRICT COURT WITHIN AND FOR
THE COUNTY OF EL PASO AND
STATE OF COLORADO
Civil Action No. 77768
Div. VI

COLORADO SPRINGS COACH COMPANY, a Colorado corporation, and BYRON COWART,	)	
Plaintiffs,	)	
vs.	)	**ORDER**
STATE OF COLORADO CIVIL RIGHTS COMMISSION and RAYMOND WENDELL HOLMES,	)	
Defendants.	)	

Petitioners' request for a judicial review of the decision of the Colorado Civil Rights Commission, pursuant to CRS 1963, 80-21-8, came on for hearing to the Court on June 7, 1974, Petitioners Colorado Springs Coach Company (the Coach Company) and Byron Cowart appearing by their attorney, Bruce L. Craig, Respondents Colorado Civil Rights Commission (Commission) and Raymond Wendell Holmes (Claimant) appearing by Jeffrey J. Sandman, Assistant Attorney General.

The record certified to the Court consists of transcripts of hearings conducted by a Hearing Examiner for the Commission on September 15, 1972 (Vol. I) and on March 16, 1973 (Vol. II),

as well as various files containing numerous exhibits and documents. A transcript of the hearing before the Industrial Commission on Mr. Holmes' claim for unemployment compensation conducted on April 19, 1971 was introduced into evidence before the Commission as Respondent's Exhibit No. 4 (Vol. II, Page 220). The record certified to this Court, however, did not contain such transcript, and a copy thereof has been obtained through the efforts of Mr. Sandman, which transcript has now been labeled Respondent's Exhibit No. 4 by the Court.

A summary of the record on what appears to be uncontroverted facts is in order prior to a ruling on the issues raised by the appeal.

Claimant had previously been employed by the Coach Company as a city bus driver, which employment he voluntarily terminated. Claimant again applied for the same position in July or August of 1970, and was promptly rehired by the Coach Company. On the date in question, February 13, 1971 (a Saturday), Mr. Holmes was working as a "protection" or "back-up" driver in the event a regular operator did not appear because of sickness or for some other reason. A regular driver did become ill, and Claimant was assigned to his run, which consisted of a split shift, one in the morning and one in the afternoon. Claimant completed his scheduled morning shift, but did not appear for the afternoon run and was not heard from until sometime the following Monday. On Monday afternoon he was informed of his discharge, and subsequently filed a claim for unemployment compensation. On or about March 30, 1971, Mr. Holmes also filed a charge of discrimination against the Coach Company with the Colorado Civil Rights Commission and with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964. The charge under the Federal Act is, apparently, still pending.

As shown by the transcript labeled Respondent's Exhibit No. 4, the April 19, 1971 Industrial Commission hearing was an appeal from two decisions denying Claimant any award. A review

of this transcript readily discloses that Claimant seeks unemployment compensation based on his allegation of wrongful discharge as a result of racial discrimination; in other words, that his employment was terminated through no fault of his own. Mr. Holmes presented a doctor's statement during this hearing to the effect that he was unable to work from February 13th to the 17th.

Claimant's contention that his discharge was a result of discrimination was not accepted by the Industrial Commission, their ruling being as follows:

> "It is concluded that the Claimant was discharged when he failed to make his scheduled runs or to inform the employer of his reasons, and he is found to be responsible for his discharge and is entitled to no award of benefits."

Claimant did not ask for a review of this decision by either the Industrial Commission or the Court.

The formal Answer filed by the Coach Company with the Commission, in response to the charge of discrimination, denied such charge and further denied jurisdiction of the Commission to hear the matter, for the reason that the issues had already been resolved by the Industrial Commission and its decision was res judicata.

At the initial hearing on September 15, 1972 before the Hearing Officer appointed by the Commission, counsel for the Coach Company asserted its defense of res judicata, thus placing in issue the jurisdiction of this body, but the Hearing Officer refused to rule on the matter. The representatives of the Coach Company and counsel then departed and the hearing continued in their absence.

As shown by the file, entitled, "District Court Proceedings," the Coach Company then sought a Writ of Prohibition in another

Division of this court on the grounds of res judicata and lack of jurisdiction. On motion of the Commission the action was dismissed, on the grounds, apparently, that the Commission had not yet issued a final order (or any order), which was necessary before the matter could be reviewed by the District Court.

Another hearing was then scheduled and conducted by the Hearing Officer on March 16, 1973 (Vol. II). The testimony during this hearing disclosed that the Coach Company ceased operation of the city bus system on September 15, 1972, which operation was taken over by the City of Colorado Springs on the following day with the permission of the Colorado Public Utilities Commission. After abandoning its city operation, the Coach Company was only authorized to operate charter trips outside the City of Colorado Springs and within the limits of the State of Colorado.

In his Initial Decision, the Hearing Officer concluded that (1) the Commission had jurisdiction over the subject matter and the parties, and (2) that the Coach Company terminated Claimant's employment "because of his race and color." He ordered reinstatement with back pay.

In his decision, the Officer also states that he is not considering the evidence received on September 15th, only the exhibits which were tendered. This Court, consequently, has excluded the testimony presented on such date, in its review and ruling.

The issues presented to this Court appear to be three in number:

> First: Has the adverse ruling of the Industrial Commission, which was not appealed, precluded Claimant from proceeding before the Commission under the doctrine of res judicata?
>
> Second: If the first question is answered in the negative, were the findings of the Commission supported by substantial evidence?

> Third: If so, did the Commission, after considering the evidence, exceed its authority in ordering reinstatement of Mr. Holmes with back pay?

The question of res judicata should first be decided by the Court. As previously mentioned, it is apparent that Claimant's basis for relief, and testimony in support thereof, was substantially the same before both the Industrial and Civil Rights Commissions; that is, a wrongful discharge as a result of a discriminatory act on the part of his employer.

In making its decision on unemployment compensation, the Industrial Commission necessarily had to decide whether the discharge was the result of a discriminatory act or whether it resulted from misconduct on the part of the Claimant. As shown by its decision quoted above, the charge of discrimination was rejected and compensation was denied.

The Hearing Officer for the Commission was faced with the same decision, and he reached an opposite conclusion.

Subsequent to the ruling by the Hearing Officer rejecting the defense of res judicata, the case of *Umberfield v. School District No. 11, et al* was decided by the Colorado Supreme Court on or about May 28, 1974. This case involved conflicting decisions of a Teacher Tenure Panel and the Civil Rights Commission. Judicial review of the decision of the Panel was not sought, but, instead, a new action was filed before the Commission, with a different result. In ruling that the Panel decision was res judicata, Justice Kelly points out the broad powers of the reviewing court under 1969 Perm. Supp., CRS 1963, 3-16-5(7), particularly where the record shows a denial of statutory or constitutional rights.

The conclusions reached in the *Umberfield* case appear to be pertinent to the instant case. Under CRS 1963, as amended, 82-4-8, the Industrial Commission is given broad powers and discretion in granting unemployment compensation, the amount

of such awards being dependent to a large extent on the reason for Claimant's unemployment. Surely, this body could consider the employee's claim of discrimination as well as the reasons advanced by the employer for his discharge in making their decision. As pointed out in the above decision, there is the additional safeguard of judicial review.

The fact that the two agencies might provide different remedies should not prevent the application of res judicata. Claimant chose his forum in filing for unemployment compensation, and to now allow him to prosecute a claim before another agency, under the same evidence, would tend to create an impossible situation for the courts.

For the reasons stated above, this Court would conclude that the doctrine of res judicata operates as a bar to the proceedings before the Civil Rights Commission.

In view of the foregoing conclusion, the Court will comment just briefly on the two remaining issues mentioned above.

It is apparent from the record that the findings of the Hearing Officer are based partially, if not entirely, on evidence that two or three Caucasian drivers had more "no shows" than Claimant (Claimant's Ex. No. 7) and were suspended prior to discharge.

The exact meaning of a "no show" is not clear from the record, although it is obvious that the term applies to a multitude of situations which vary from slight infractions of the rules to more serious breaches. There was also competent testimony that different rules applied to a driver who lost all contact and did not report for any assignment, as well as a driver listed as "off till report" (Vol. II, Pages 171 and 181).

In determining whether to suspend or discharge, it would not be unusual or improper for an employer to consider the seriousness of the current violation as well as the facts surrounding

any prior violations. Many factors would enter into this decision, including, by way of example, the following: If tardy, was he late two minutes or two hours? Did he have a justifiable excuse? Was contact established early in the process? Are we dealing with a short-term employee or one approaching retirement age? Did the violation cause undue hardship to the employer or any fellow employee? And, in the instant case, were the Caucasian drivers, at the time of their "no shows", working regularly assigned runs or were they "back-up" or "protection" drivers, as was Claimant at the time in question?

Without belaboring the point, the Court would conclude that facts necessary to support a fair inference of discrimination are not present in this case (*Colorado Civil Rights Commission v. School District No. 1*, Colo. App., 488 P. 2d 83).

As to the authority of the Commission to order reinstatement with pay, the record discloses that the Coach Company, as of September 16, 1972, because of severe financial difficulties, no longer has the authority to operate a city bus line. Its Certificate of Authority is now limited to charter trips outside the city, which requires drivers possessing certain qualifications and training for this type of operation. The Court would question the authority of the Commission to require reinstatement under these circumstances.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court, that, for the reasons stated above, the decision and order of the Colorado Civil Rights Commission be set aside and that the Complaint be dismissed.

DONE in Open Court, this 14th day of August, 1974.

BY THE COURT:

Hunter D. Hardeman
District Judge

Appendix D

COLORADO COURT OF APPEALS
No. 74-426

COLORADO SPRINGS COACH COMPANY, a Colorado Corporation, and BYRON COWART,	)
Plaintiffs-Appellees,	)
v.	)
STATE OF COLORADO CIVIL RIGHTS COMMISSION and RAYMOND WENDELL HOLMES,	)
Defendants-Appellants.	)

Appeal from the District Court of El Paso County
Honorable Hunter D. Hardeman, Judge

DIVISION I JUDGMENT AFFIRMED

Coyte, Van Cise, and Sternberg, JJ.

Bruce L. Craig
Colorado Springs, Colorado

Attorney for Plaintiffs-Appellees

John P. Moore, Attorney General
John E. Bush, Deputy Attorney General
Jeffrey I. Sandman, Assistant Attorney General
Denver, Colorado

Attorneys for Defendants-Appellants

Opinion filed and judgment entered on the 11th of March, 1975.

Opinion by JUDGE STERNBERG

Defendant Holmes was employed by the Colorado Springs Coach Company as a city bus driver from August 1970 to February 1971. The company discharged him for failure to appear for work. He filed a claim for unemployment compensation, but a determination of "no award" was made by a deputy referee. This decision was upheld by a referee following a hearing on April 19, 1971. Holmes' claim was based in part on the allegation that his discharge was the result of racial discrimination. However, the referee denied him benefits concluding that his discharge was based upon his failure "to make his scheduled runs or to inform his employer of his reasons." The Industrial Commission affirmed the decision, but Holmes sought no further review.

In March of 1971, Holmes filed a charge against the employer with the Colorado Civil Rights Commission alleging that his termination had been because of his race and color, and was therefore illegally discriminatory. Disregarding the employer's affirmative defense of *res judicata*, the hearing officer for the Civil Rights Commission found that the discharge was a violation of the Colorado Antidiscrimination Act of 1957, §24-34-301 et seq., C.R.S. 1973 (C.R.S. 1963, 80-21-1 et seq.), and ordered Holmes to be reinstated with back pay. This order was appealed to the district court. That court set it aside and dismissed the complaint. We affirm.

The case of *Umberfield v. School District No. 11*, ___ Colo. ___, 522 P.2d 730, controls this case. There, discharge of a teacher for failure to work on scheduled school days because of religious beliefs was upheld after a hearing held pursuant to the Teacher Tenure Act, §22-63-101 et seq., C.R.S. 1973 (1967 Perm. Supp., C.R.S. 1963, 123-18-1 et seq.). The teacher, Umberfield, did not appeal that action to the courts, but instead

filed a complaint with the Colorado Civil Rights Commission alleging religious discrimination. Holding that the complaint was barred, the Supreme Court stated:

> "Because Umberfield had a full adversary hearing before the Teacher Tenure Panel which had the power to determine all his claims of religious discrimination, we hold that the doctrine of *res judicata* operates as a bar to the relitigation of issues which Umberfield raised or could have raised in the hearing before that panel and on judicial review. . . . To hold otherwise could result in an anomalous situation where the same reviewing court would be compelled to affirm opposite results of the two administrative bodies."

Just as the Teacher Tenure Panel's conclusions could not be collaterally attacked by Umberfield, so must the decision of the Industrial Commission on the cause of termination of employment bar a subsequent proceeding before the Civil Rights Commission in this case.

Judgment affirmed.

JUDGE COYTE and JUDGE VAN CISE concur.

Appendix E
Colorado Antidiscrimination Act of 1957

C.R.S. 1973, 24-34-301. Short title. This part 3 shall be known and may be cited as the "Colorado Antidiscrimination Act of 1957".

24-34-302. Definitions. As used in this part 3, unless the context otherwise requires:

(1) "Apprenticeship" means any program for the training of apprentices including, but not limited to, any program providing the training of those persons defined as apprentices by section 8-15-101, C.R.S. 1973, whether or not such program is registered and approved by the apprenticeship council under section 8-15-105, C.R.S. 1973.

(2) "Commission" means the Colorado civil rights commission, created by this part 3, and the term "commissioner" means a member of that commission.

(3) "Coordinator" means the coordinator of fair employment practices, which office is created by this part 3.

(4) "Court" means the district court for the judicial district of the state of Colorado in which the asserted unfair employment practice occurred, or if said court is not in session at that time, then any judge of said court.

(5) "Employee" means any person employed by an employer, except a person in the domestic service of any person.

(6) "Employer" means the state of Colorado or any political subdivision, commission, department, institution, or school district thereof, and every other person employing persons within the state; but it does not mean religious organizations or associations, except such organizations or associations supported in whole or in part by money raised by taxation or public borrowing.

(7) "Employment agency" means any person undertaking to procure employees or opportunities to work for any other person or holding itself out to be equipped to do so.

(8) "Joint apprenticeship committee" means any association of representatives of a labor organization and an employer providing, coordinating, or controlling an apprentice training program.

(9) "Labor organization" means any organization which exists for the purpose in whole or in part of collective bargaining, or of dealing with employers concerning grievances, terms, or conditions of employment, or of other mutual aid or protection in connection with employment.

(10) "On-the-job training" means any program designed to instruct a person who, while learning the particular job for which he is receiving instruction, is also employed at that job or who may be employed by the employer conducting the program during the course of the program or when the program is completed.

(11) "Person" means one or more individuals, partnerships, associations, corporations, legal representatives, trustees, receivers, or the state of Colorado, and all political subdivisions and agencies thereof.

(12) "Unfair employment practice" means those practices specified as discriminatory or unfair in section 24-34-306.

(13) "Vocational school" means any school or institution conducting a course of instruction, training, or retraining to prepare individuals to follow an occupation or trade, or to pursue a manual, mechanical, technical, industrial, business, commercial, office, personal service, or other nonprofessional occupation.

24-34-303. Civil rights division. There is hereby created a division of state government to be known and designated as the Colorado civil rights division which said division shall be under the jurisdiction and direction of the Colorado civil rights commission. The division shall have as its immediate supervisory head a coordinator of fair employment practices. Such coordinator shall be appointed by the governor pursuant to article XII, section 13 of the state constitution. Any coordinator so appointed shall at all times be under the direct supervision and control of the Colorado civil rights commission.

24-34-304. Civil rights commission - membership. The Colorado civil rights commission shall be the head of the division of civil rights within the department of regulatory agencies. The commission shall consist of seven members, who shall be appointed

by the governor, with the consent of the senate, for terms of four years, except that of the first members appointed, two shall be appointed for terms of two years and two shall be appointed for terms of three years. Appointments shall be made to provide geographical area representation insofar as may be practicable, and no more than four members shall belong to the same political party. Vacancies shall be filled by the governor by appointment, with the consent of the senate, and the term of a commissioner so appointed shall be for the unexpired part of the term for which he is appointed. Any commissioner may be removed from office by the governor for cause. Commissioners shall serve without compensation but shall be reimbursed for necessary travel expenses incurred by them while on official commission business. The commission may adopt, amend, or rescind rules for governing its meetings, and four commissioners shall constitute a quorum.

24-34-305. Powers and duties of commission. (1) The Colorado civil rights commission has the following powers and duties:

(a) To appoint such investigators and other employees and agents, pursuant to article XII, section 13 of the state constitution, as it may deem necessary for the enforcement of this part 3, and to prescribe their duties;

(b) To adopt, publish, amend, and rescind regulations consistent with and for the enforcement of this part 3;

(c) To receive, investigate, and pass upon complaints alleging discrimination in employment, apprenticeship programs, on-the-job training programs, or vocational schools or the existence of a discriminatory or unfair employment practice by a person, an employer, an employment agency, a labor organization, their employees or members, a joint apprenticeship committee, or a vocational school;

(d) To investigate and study the existence, character, causes, and extent of discrimination in employment, apprenticeship programs, on-the-job training programs, or vocational schools in this state by employers, employment agencies, and labor organizations, joint apprenticeship committees, or vocational schools and to formu-

late plans for the elimination thereof by educational or other means;

(e) (I) To hold hearings upon any complaint made against a person, an employer, an employment agency, a labor organization, their employees or members, a joint apprenticeship committee, or a vocational school; to subpoena witnesses and compel their attendance; to administer oaths and take the testimony of any person under oath, and to compel such employer, employment agency, labor organization, joint apprenticeship committee, or vocational school, official, or other person to produce for examination any books and papers relating to any matter involved in such complaint. Such hearings may be held by the commission itself, or by any commissioner, or by the coordinator, or by any hearing examiner appointed by the commission. If a witness either fails or refuses to obey a subpoena issued by the commission, the commission may petition the district court having jurisdiction for issuance of a subpoena in the premises and the court shall in a proper case issue its subpoena; refusal to obey such subpoena shall be punishable as contempt.

(II) No person may be excused from attending and testifying or from producing records, correspondence, documents, or other evidence in obedience to a subpoena in any such matter on the ground that the evidence or the testimony required of him may tend to incriminate him or subject him to any penalty or forfeiture; but no person may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled to testify or produce evidence after having claimed his privilege against self-incrimination, except that such person so testifying may not be exempted from prosecution and punishment for perjury in the first degree committed in so testifying.

(f) To issue such publications and reports of investigations and research as in its judgment will tend to promote good will among the various racial, religious, and ethnic groups of the state and which will tend to minimize or eliminate discrimination in employment because of race, creed, color, national origin, or ancestry. Publications of the commission circulated in quantity

outside the executive branch shall be issued in accordance with fiscal rules promulgated by the controller pursuant to the provisions of section 24-30-208.

(g) To prepare and transmit annually, in the form and manner prescribed by the controller pursuant to the provisions of section 24-30-208, a report accounting to the governor and the general assembly for the efficient discharge of all responsibilities assigned by law or directive to the commission;

(h) To recommend policies to the governor and to submit recommendations to employers, employment agencies, and labor organizations to effectuate such policies;

(i) To make recommendations to the general assembly for such further legislation concerning discrimination because of race, creed, color, national origin, or ancestry as it may deem necessary and desirable;

(j) To cooperate, within the limits of any appropriations made for its operation, with other agencies or organizations, both public and private, whose purposes are consistent with those of this part 3, in the planning and conducting of educational programs designed to eliminate racial, religious, cultural, and intergroup tensions;

(k) To adopt an official seal.

24-34-306. Discriminatory and unfair employment practices. (1) It shall be a discriminatory or unfair employment practice:

(a) For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation against any person otherwise qualified because of race, creed, color, sex, national origin, or ancestry;

(b) For an employment agency to refuse to list and properly classify for employment or to refer an individual for employment in a known available job for which such individual is otherwise qualified because of race, creed, color, sex, national origin, or ancestry; or to comply with a request from an employer for referral of applicants for employment if the request indicates either directly or indirectly that the employer discriminates in employment on account of race, creed, color, sex, national origin, or ancestry;

(c) For a labor organization to exclude any individual otherwise qualified from full membership rights in such labor organization, or to expel any such individual from membership in such labor organization, or to otherwise discriminate against any of its members in the full enjoyment of work opportunity because of race, creed, color, sex, national origin, or ancestry;

(d) For any employer, employment agency, or labor organization to print or circulate or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment or membership, or to make any inquiry in connection with prospective employment or membership which expresses, either directly or indirectly, any limitation, specification, or discrimination as to race, creed, color, sex, national origin, or ancestry, or intent to make any such limitation, specification, or discrimination; unless based upon a bona fide occupational qualification or required by and given to an agency of government for security reasons;

(e) For any person, whether or not an employer, an employment agency, a labor organization, or the employees or members thereof to aid, abet, incite, compel, or coerce the doing of any act defined in this section to be a discriminatory or unfair employment practice, or to obstruct or prevent any person from complying with the provisions of this part 3 or any order issued thereunder, or to attempt, either directly or indirectly, to commit any act defined in this section to be a discriminatory or unfair employment practice;

(f) For any employer, labor organization, joint apprenticeship committee, or vocational school providing, coordinating, or controlling apprenticeship programs or providing, coordinating, or controlling on-the-job training programs or other instruction, training, or retraining programs:

(I) To deny to or withhold from any qualified person because of his race, creed, color, sex, national origin, or ancestry the right to be admitted to or participate in an apprenticeship training program, on-the-job training program or other occupational instruction, training, or retraining program;

(II) To discriminate against any qualified person in his pursuit

of such programs or to discriminate against such a person in the terms, conditions, or privileges of such programs because of race, creed, color, sex, national origin, or ancestry;

(III) To print or circulate or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for such programs, or to make any inquiry in connection with such program which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, creed, color, sex, national origin, or ancestry or any intent to make any such limitation, specification, or discrimination unless based on a bona fide occupational qualification.

(g) For any private employer to refuse to hire, or discriminate against any person, whether directly or indirectly, who is otherwise qualified for employment, solely because the person did not apply for employment through a private employment agency; but an employer shall not be deemed to have violated the provisions of this section if such employer retains one or more employment agencies as exclusive suppliers of personnel and no employment fees are charged to an employee who is hired as a result of having to utilize the services of any such employment agency.

(2) Notwithstanding any provisions of this section to the contrary, it is not an unlawful discriminatory practice for the division of employment of the department of labor and employment to ascertain and record the age, sex, race, creed, color, or national origin of any individual for the purpose of making such reports as may be required by law to agencies of the federal or state government only. Said records may be made and kept in the manner required by the federal or state law, but no such information shall be divulged by said division or department to prospective employers as a basis for employment, except as provided in this subsection (2).

24-34-307. Complaint-hearing-procedure. (1) Any person claiming to be aggrieved by a discriminatory or unfair employment practice may, by himself or his attorney-at-law, make, sign, and file with the commission a verified written complaint in duplicate which shall state the name and address of the person,

employer, employment agency, labor organization, joint apprenticeship committee, or vocational school alleged to have committed the discriminatory or unfair employment practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the commission. The commission, a commissioner, or the attorney general may in like manner make, sign, and file such complaint.

(2) Any employer, labor organization, joint apprenticeship committee, or vocational school whose employees or members, or some of them, refuse or threaten to refuse to comply with the provisions of this part 3 may file with the commission a verified written complaint in duplicate asking the commission for assistance to obtain their compliance by conciliation or other remedial action.

(3) After the filing of a complaint, the coordinator or a commissioner shall make, with the assistance of the staff, a prompt investigation thereof, and if such investigating official determines that probable cause exists for crediting the allegations of the complaint, he shall immediately endeavor to eliminate such discriminatory or unfair employment practice by conference, conciliation, and persuasion.

(4) The members of the commission and its staff shall not disclose the filing of a complaint, the information gathered during the investigation, or the endeavors to eliminate such discriminatory or unfair employment practice by conference, conciliation, and persuasion unless such disclosure is made in connection with the conduct of such investigation.

(5) In case of failure to satisfactorily settle a complaint by conference, conciliation, and persuasion, or in advance thereof, if in the opinion of the investigating official circumstances so warrant, he may issue and cause to be served a written notice, together with a copy of such complaint as the same may have been amended, requiring the person, employer, employment agency, labor organization, joint apprenticeship committee, or vocational school named in such complaint, referred to in this section as respondent, to answer the charges of such complaint in

writing within ten days after the date of such notice or within such extended time as the investigating official may allow.

(6) When the investigating official is satisfied that further endeavors to settle a complaint by conference, conciliation, and persuasion will be futile, he shall report the same to the commission. If the commission determines that the circumstances warrant, it shall issue and cause to be served a written notice requiring the respondent to answer the charges of such complaint at a hearing before the commission, a commissioner, or other person designated by the commission to conduct the hearing, referred to in this section as hearing examiner, at a time and place to be specified in such notice.

(7) The case in support of such complaint shall be presented at the hearing by one of the commission's attorneys or agents. The investigating official shall not participate in the hearing except as a witness, nor shall he participate in the deliberations of the commission in such case.

(8) The respondent may file a written verified answer to the complaint and appear at the hearing in person, or otherwise, with or without counsel, and submit testimony. In the discretion of the hearing examiner, a complainant may be allowed to intervene and present testimony in person or by counsel.

(9) When a respondent has failed to answer a complaint at a hearing as provided in this section, the commission may enter his default. For good cause shown, the commission may set aside an entry of default within ten days after the date of such entry. In the event the respondent is in default, the commission may proceed to hear testimony adduced upon behalf of the complainant. After hearing such testimony, the commission may enter such order as in its opinion the evidence warrants.

(10) The commission or the complainant shall have the power to reasonably and fairly amend any complaint, and the respondent shall have like power to amend his answer.

(11) The commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity, but the right of cross-examination shall be preserved. The testimony taken at a hearing shall be under oath and shall be transcribed.

(12) If, upon all the evidence at a hearing, the commission finds that a respondent has engaged in or is engaging in any discriminatory or unfair employment practice as defined in this part 3, the commission shall state its findings of fact and shall issue and cause to be served upon such respondent an order requiring such respondent to cease and desist from such discriminatory or unfair employment practice and to take such affirmative action, including (but not limited to) hiring, reinstatement, or upgrading of employees, with or without back pay, the referring of applicants for employment by any respondent employment agency, the restoration to membership by any respondent labor organization, the admission to or continuation in enrollment in an apprenticeship program, on-the-job training program, or a vocational school, the posting of notices, and the making of reports as to the manner of compliance, as in the judgment of the commission will effectuate the purposes of this part 3.

(13) If, upon all of the evidence at a hearing, the commission finds that a respondent has not engaged in any such discriminatory or unfair employment practice, the commission shall state its findings of fact and shall issue and cause to be served an order on the complainant dismissing the complaint.

(14) The commission shall establish rules to govern, expedite, and effectuate the foregoing procedures and its own actions thereunder.

(15) Any complaint filed pursuant to this part 3 must be so filed within six months after the alleged discriminatory or unfair employment practice occurred.

24-34-308. Judicial review and enforcement. (1) Any complainant or respondent claiming to be aggrieved by a final order of the commission, including a refusal to issue an order, may obtain judicial review thereof, and the commission may obtain an order of court for its enforcement in a proceeding as provided in this section.

(2) Such proceeding shall be brought in the district court of the district in which is located the county wherein the alleged discriminatory or unfair employment practice which is the subject of the

commission's order was committed or wherein any respondent, required in the order to cease and desist from a discriminatory or unfair employment practice or to take other affirmative action, resides or transacts business.

(3) Such proceeding shall be initiated by the filing of a petition in such court and the service of a copy thereof upon the commission and upon all parties who appeared before the commission. Thereupon the commission shall file with the court a transcript of the record of the hearing before it. The court shall have jurisdiction of the proceeding and the questions determined therein and shall have power to grant such temporary relief or restraining order as it deems just and proper and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript an order enforcing, modifying, and enforcing as so modified or setting aside the order of the commission in whole or in part.

(4) An objection that has not been urged before the commission shall not be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

(5) Any party may move the court to remit the case to the commission in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereof, provided such party shows reasonable grounds for the failure to adduce such evidence before the commission.

(6) The findings of the commission as to the facts shall be conclusive if supported by substantial evidence.

(7) The jurisdiction of the court shall be exclusive and its judgment and order shall be final, subject to review as provided by law and the Colorado appellate rules.

(8) The commission's copy of the testimony shall be available to all parties for examination at all reasonable times, without cost, and for the purpose of judicial review of the commission's orders.

(9) The commission may appear in court by its own attorney.

(10) Unless otherwise directed by the commission or court,

commencement of review proceedings under this section shall operate as a stay of any order.

(11) Petitions filed under this section shall be heard expeditiously and determined upon the transcript filed, without requirement for printing. Hearings in the court under this part 3 shall take precedence over all other matters, except matters of the same character.

(12) If no proceeding to obtain judicial review is instituted by a complainant or respondent within thirty days from the service of an order of the commission pursuant to section 24-34-307, the commission may obtain a decree of the court for the enforcement of such order upon showing that respondent is subject to the jurisdiction of the commission and resides or transacts business within the county in which the petition for enforcement is brought.

Colorado Employment Security Act
(in relevant part)

C.R.S. 1973, 8-73-108. Benefit awards. (1) In the granting of benefit awards, it is the intent of the general assembly that the division at all times be guided by the tenet that unemployment insurance is for the benefit of persons unemployed through no fault of their own; and that each eligible individual who is unemployed through no fault of his own shall be entitled to receive benefits; and that every person has the right to leave any job for any reason, but that the circumstances of his separation shall be considered in determining the amount of benefits he may draw; and that certain acts of individuals are the direct and proximate cause of their unemployment and such acts may result in such individuals receiving fifty percent of full awards, a special award, an optional award, or no award.

(2) (a) A full award of benefits shall be the total amount of benefits computed under sections 8-73-102 and 8-73-104, adjusted when required by the provisions of paragraphs (b), (c), and (d) of this subsection (2).

(b) (I) An individual who receives a no award determination of benefits based upon a separation from work occurring at any time

from the beginning of the base period to the date of filing a claim or who is given a no award decision under subsection (6) (c) of this section shall be disqualified from receiving unemployment benefits under articles 70 to 82 of this title for a period of not less than thirteen nor more than twenty-five weeks beginning with the week in which the disqualifying act occurred, as determined by the division, according to the circumstances in each case; and the total benefits computed under section 8-73-104 shall be reduced by the number of weeks of disqualification multiplied by the claimant's weekly benefit amount; but no claimant's total amount of benefits as initially computed shall be reduced to less than one week of benefits because of a single disqualifying act.

(II) If a claimant is given a no award by reason of a separation from employment, the employer from whom the separation occurred shall not be charged for experience rating purposes with an amount of benefits paid to such claimant except those benefits which represent an amount equal to the difference between the total potential benefits chargeable to such employer and a sum equal to the number of weeks of disqualification multiplied by the claimant's weekly benefit amount.

(III) If the no award decision is based upon a discharge for misconduct connected with the claimant's last employment, the period of disqualification shall be for twenty-six weeks and the total benefit amount shall be reduced to zero, other provisions of this subsection (2) notwithstanding.

(c) A full award of benefits shall be reduced by fifty percent of the weekly benefit amount and total amount of benefits based on all wages earned prior to separation from a job which resulted in a determination of a fifty percent award.

(d) The payment of benefits provided by paragraphs (a), (b), and (c) of this subsection (2) to an individual separated from employment under the conditions set forth in subsection (8) of this section may be paid for weeks of unemployment occurring after said separation from employment only after said individual has complied with the requirements of subsection (8) of this section.

(3) Benefits payable under the provisions of this section shall be awarded, subject to other applicable provisions of articles 70 to 82

of this title, when the unemployment is the result of one or more of the causes provided for in subsections (4) to (8) of this section.

(4) **Full award.** An individual separated from a job for any of the reasons set forth as follows in this subsection (4) shall be given a full award of benefits if the reason and pertinent conditions related thereto are determined by the division to have existed; otherwise there shall be given a no award, fifty percent of full award, or a special award, as determined by the division in conformity with the facts:

(a) Laid off for lack of work;

(b) (I) The health of the worker is such that he must quit his employment and refrain from working for a period of time, but at the time of filing his claim he is able and available for work, or the worker's health is such that he must seek a new occupation, or the health of the worker, his spouse, or his dependent child is such that the worker must leave the vicinity of his employment; except that, if the health of the worker or that of his spouse or his dependent child has caused the separation from work, the worker, in order to be entitled to a full award, must have complied with the following requirements: Informed his employer of the condition of his health or the health of his spouse or dependent child prior to quitting his employment; substantiated the cause by a competent written medical statement issued prior to the date of quitting when so requested by the employer prior to the date of quitting or within a reasonable period thereafter; submitted himself or his spouse or his dependent child to an examination by a licensed practicing physician selected and paid by the interested employer when so requested by the employer prior to the date of quitting or within a reasonable period thereafter; and submitted himself, his spouse, or his dependent child to an examination by a licensed practicing physician selected and paid by the division when so requested by the division.

(II) In the event of an injury or sudden illness of the worker which would preclude notification of the employer prior to such occurrence, the failure of the worker to notify the employer prior to such occurrence will not in itself constitute a reason for the

denial of benefits if the worker has notified the employer at the earliest practicable time after such occurrence.

(III) Any physician who makes or is present at any examination required under these provisions shall testify as to the results of his examination; except that no such physician shall be required to disclose any confidential communication imparted to him for the purpose of treatment which is not necessary to a proper understanding of the case.

(c) Unsatisfactory or hazardous working conditions when so determined by the division. In determining whether or not working conditions are unsatisfactory for an individual, the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, the distance of the work from his residence, and the working conditions of workers engaged in the same or similar work for the same and other employers in the locality shall be considered. For the purpose of this paragraph (c), "hazardous working conditions" means such conditions, as are determined by the division to exist, that could result in a danger to the physical or mental well-being of the worker. In any such determination the division shall consider, but shall not be limited to a consideration of, the following: The safety measures used or the lack thereof and the condition of equipment or lack of proper equipment. No work shall be considered hazardous if the working conditions surrounding a worker's employment are the same or substantially the same as the working conditions generally prevailing among workers performing the same or similar work for other employers engaged in the same or similar type of activity.

(d) A substantial change in the worker's working conditions, said change in working conditions being substantially less favorable to the worker but requiring a worker to work a different shift, shall not be considered a substantial change in working conditions unless such requirement would be a violation of seniority rights which would entitle the worker to shift preferential, but in any such case the burden of proving such seniority rights shall rest upon the worker. No change in working conditions shall be considered substantial if it is determined by the division that the

conditions prevailing after the change are those generally prevailing for other workers performing the same or similar work.

(e) Unreasonable reduction in the worker's rate of pay as determined by the division. In determining whether or not there has been an unreasonable reduction in the worker's rate of pay, the division shall consider, but shall not be limited to a consideration of, whether or not the reduction in pay was applied by the employer to all workers in the same or similar class or merely to this individual, the general economic conditions prevailing in the state, the financial condition of the employer involved, and whether or not the reduction in wage was agreed to by other workers employed in the same or similar work.

(f) Accepting a better job. In determining whether or not the job accepted is a better job, the division of employment shall consider, but shall not be limited to a consideration of, the rate of pay, the hours of work, and the probable permanency of the job quit as compared to the job accepted; the cost to the worker in getting to the job quit and to the job accepted; the distance from the worker's place of residence to the job accepted in comparison to the distance from the worker's residence to the job quit; and whether or not such worker acted as a reasonably prudent individual would have acted under the same or similar conditions. In addition to the above stated conditions, no job shall be considered better unless it is offered to and accepted by the worker prior to the date of his quitting and meets the following conditions:

(I) It does not have a definite termination date of less than one year, and it lasts at least ninety calendar days from the first date of employment on the job accepted unless sooner terminated under conditions of which, in the judgment of the division, the worker had no knowledge at the time he accepted the job and over which he had no control, but a job shall not be considered better if it lasts less than ninety days due to a lack of work, the absence of said knowledge and control notwithstanding.

(II) The ninety-day and one-year provisions set forth in subparagraph (I) of this paragraph (f) shall not apply to a construction worker who quits a construction job within thirty days immediately

preceding the termination date of the job quit and who, at the time of his quitting, has been offered and has accepted another construction job prior to the date of quitting, which other job offers employment for a longer period of time than remained available on the job quit unless the job accepted was terminated by a contract cancellation.

(III) For the purpose of this paragraph (f), the job accepted shall be considered to exist only for so long as the worker is actually in employment.

(IV) For purposes of this paragraph (f), leaving a job to comply with a condition of apprentice assignment to an employer, which condition was imposed to meet the conditions of a joint apprenticeship or other apprenticeship program and is in accordance with requirements for programs registered with the federal government and in conformity with the rules of the Colorado apprenticeship council, constitutes accepting a better job.

(g) Being given the choice by his employer between being terminated, furloughed, or laid off, and replacing another worker, and the worker has elected to accept a termination, furlough, or layoff;

(h) Quitting employment because of a violation of the employment contract by the employer; except that before such quitting the worker must have exhausted all remedies provided in such contract for the settlement of disputes before quitting his job;

(i) Being discharged from employment without the employer informing either the worker or the division, after a request from the division as to the reason for the discharge;

(j) Being physically or mentally unable to perform the work or unqualified to perform the work as a result of insufficient educational attainment or inadequate occupational or professional skills;

(k) Refusing with good cause to work overtime without reasonable advance notice. Good cause as used in this paragraph (k) shall be restricted to compelling personal reasons affecting either the worker or his immediate family.

(l) Being instructed or requested to perform a service or commit an act which is in violation of an ordinance or statute;

(m) Involuntary retirement in accordance with company policy or at the volition of the employer;

(n) Quitting employment under conditions which would not have resulted in a denial of benefits under the provisions of paragraph (x) of subsection (6) of this section.

(5) **Fifty percent of full award.** Fifty percent of a full award shall be one-half the weekly benefit amount and for one-half the total benefit amount the claimant would otherwise have been entitled to receive as computed under sections 8-73-102 and 8-73-104 when the unemployment is the result of one or more of the causes provided in the following schedule:

(a) Violation of a company rule which did not result or could not have resulted in serious damage to the employer's property or interests, or did not or could not have endangered the life of the worker or other employees;

(b) Under conditions indicating that the claimant contributed to, but was not wholly responsible for, incompatibility with a supervisor or fellow employees;

(c) Under conditions which do not conclusively indicate that there was either a voluntary separation at the worker's instigation or discharge at the employer's volition and that the responsibility for the separation is shared by the worker and the employer.

(6) **No award.** An individual separated from a job or who refuses to accept suitable work or refuses a referral to suitable work for any of the following reasons shall be given a no award of benefits if the reason and pertinent conditions related thereto are determined by the division to have existed; otherwise he shall be given a full award, fifty percent of full award, or special award, as determined by the division in conformity with the facts:

(a) Quitting employment because of dissatisfaction with prevailing rates of pay, standard hours of work, standard working conditions, or working conditions which generally prevail for other workers performing the same or similar work, regularly assigned duties, or opportunities for advancement;

(b) Quitting employment because of dissatisfaction with supervisor with no evidence to indicate that the supervision is other

than that reasonably to be expected in the proper performance of work;

(c) Quitting to marry, irrespective of whether or not such marriage occurs subsequent to the separation from employment;

(d) Moving to another area except for health reasons or moving to accept a better job;

(e) Quitting for no apparent reason;

(f) Lack of transportation. Transportation shall be the responsibility of the worker; if, however, in the opinion of the division, it would have been unreasonable to require the worker to continue in employment with his same employer at a new job site substantially less accessible or substantially more distant from the worker's residence than the site at which he had worked, benefits shall not be denied because of his refusal to continue in employment at the new site.

(g) Quitting to seek other work, not having first accepted an offer of other employment, or quitting to accept other employment which could not be construed as a better job as provided in subsection (4) (f) of this section;

(h) Insubordination such as: Deliberate disobedience of a reasonable instruction of an employer or his duly authorized representative; refusal or failure to obtain or renew licenses which are necessary to permit the claimant to perform his job; failure to keep in good standing with the union because of nonpayment of dues; repeated acts of agitation against employer working conditions, pay scale, policies, or procedures; except that orderly action on the part of an employee or through union negotiation shall not be so considered if such action does not interfere with work performance;

(i) Violation of a statute or of a company rule which resulted or could have resulted in serious damage to the employer's property or interests, or could have endangered the life of the worker or other employees, such as: Mistreatment of patients in a hospital or nursing home; serving liquor to minors; selling prescription items without prescriptions from licensed doctors; profane or obscene language after warnings; immoral conduct which has an effect on worker's job status; divulging of confidential information

which resulted or could have resulted in damage to the employer's interests; failure to observe conspicuously posted safety rules; intentional falsification of expense accounts, inventories, or other records or reports; or removal or attempted removal of employer's property from the premises of the employer without proper authority;

(j) Off-the-job use of not medically prescribed intoxicating beverages or narcotics to a degree resulting in interference with job performance;

(k) On-the-job use of not medically prescribed intoxicating beverages or narcotics;

(l) Incarceration for violation of law or loss of license essential to job performance through law violation;

(m) Theft;

(n) Assaulting or threatening to assault under circumstances such as to cause a reasonably emotionally stable person to become concerned as to his physical safety;

(o) Willful neglect or damage to an employer's property or interests;

(p) Rudeness, insolence, or offensive behavior of the worker not reasonably to be countenanced by a customer, supervisor, or fellow worker;

(q) Careless or shoddy work. In determining whether or not work has been performed in a careless or shoddy manner, the division shall consider the length of time the worker has been performing the work satisfactorily, and no work shall be considered careless or shoddy that comes within the areas of reasonable mistakes and errors normally made by workers engaging in the same or similar work.

(r) Failure to properly safeguard, maintain, or account for the employer's property when this obligation is an essential part of the job;

(s) Going hunting, engaging in sports, taking unauthorized vacations, or failing to return to work as scheduled after an authorized vacation or other leave of absence unless such failure to return to work was caused by circumstances which would result in a full award under the provisions of this section;

(t) Refusal to work a different shift when no violation of seniority rights, as provided in paragraph (d) of subsection (4) of this section, is involved;

(u) Refusal to accept transfer to another department which does not involve a substantial change in working conditions or a substantial loss in wages;

(v) Quitting under conditions involving personal reasons which do not, under other provisions of this section, provide for an award of benefits;

(w) Returning to school;

(x) (I) The refusal of suitable work or refusal of referral to suitable work at any time from the beginning of the base period to the time of the filing of a claim. In determining whether or not any work is suitable for an individual, the degree of risk involved to his health, safety, and morals; his physical fitness and prior training; his experience and prior earnings; his length of unemployment and prospects for securing work in his customary occupation; and the distance of the available local work from his residence shall be considered. Notwithstanding any other provisions of articles 70 to 82 of this title, no work shall be deemed suitable and benefits shall not be denied under articles 70 to 82 of this title to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(B) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

(C) If as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

(II) An award shall not be denied to an individual more than once for failure to apply for or to accept the same or a similar position with the same employer.

(III) An award shall not be denied because an individual quits employment to participate in a student-learner program of occupational education under the auspices of a public school, junior

college, community and technical college, federally funded work-training program, or proprietary school approved by the state board for community colleges and occupational education.

(7) (a) **Optional award.** If, in the administration of articles 70 to 82 of this title, the division of employment determines that a claim for benefits is not specifically covered under other provisions of this section, the division shall grant a full award, fifty percent of full award, or special award or make a determination of no award. The general assembly determines that, by reason of the wide variance of facts and the conditions surrounding the causes of separation from work, the division shall include the following causes for separation from work under optional award: Tardiness, absenteeism, garnishment, constructive criticism, abuse of coffee break privileges, overstaying of lunch periods, sleeping on the job, and loafing on the job.

(b) In its consideration of granting any optional award, the division shall consider, but shall not be limited to a consideration of, whether or not:

(I) The discharge was caused by a single instance or whether there were several instances;

(II) The claimant had been previously warned or whether the employer had condoned similar infractions;

(III) The act or failure to act on the part of the claimant interrupted the work schedule of the employer or endangered the health or safety of the claimant or others;

(IV) Other employees were unable to work because of the act or failure to act on the part of the claimant;

(V) The claimant notified the employer in advance;

(VI) The act or failure to act on the part of the claimant was unavoidable or was caused by the illness of the claimant or a member of his immediate family;

(VII) The employer had an established and published or promulgated policy;

(VIII) The claimant's act or failure to act resulted in damage to the employer's property or interest or in a distinguishable difference in the quantity or quality of work performed;

(IX) The claimant had kept the employer informed of his status during his absence;

(X) The criticism which resulted in separation was actually of a constructive nature and given in a considerate manner.

(8) **Special award.** A worker who becomes separated from employment under conditions enumerated in this subsection (8) shall be entitled to a special award of benefits. A worker who has received a special award of benefits shall not be entitled to benefit payments until, subsequent to the separation which caused the special award, he has worked for thirteen weeks in full-time employment in Colorado or full-time employment outside Colorado which was covered by an unemployment insurance law, or a combination thereof which totals thirteen full weeks, and is otherwise eligible. The conditions are as follows:

(a) Marital, parental, filial, or domestic obligation;

(b) To engage in self-employment;

(c) Under conditions reflecting a withdrawal from active attachment to the labor force;

(d) Notwithstanding other provisions of this subsection (8), awards to workers who are separated from a job because of pregnancy shall be made in accordance with the following provisions:

(I) If involuntarily separated from a job because of pregnancy, the worker shall be awarded a full award of benefits if otherwise eligible until thirty days prior to the expected termination of pregnancy, but, if a pregnant worker has been separated prior to the termination of her pregnancy according to the provisions of a reasonable rule of the employer providing for the separation of pregnant workers, such worker shall not be entitled to benefits prior to the termination of her pregnancy.

(II) If voluntarily separated by reason of her pregnancy, such worker shall not be entitled to benefits prior to the termination of her pregnancy.

(III) If she is the sole support of her child, children, or invalid husband, she shall be granted a full award of benefits after thirty days subsequent to the termination of her pregnancy for each remaining week of her benefit year wherein she is the

sole support, if otherwise eligible, and has wage credits remaining.

(IV) If she is not the sole support of her child, children or invalid husband, no award until she has reentered the labor market and has worked for thirteen weeks subsequent to the termination of her pregnancy in full-time employment in Colorado or in full-time employment outside Colorado which was covered by an unemployment insurance law, or a combination thereof which totals thirteen full weeks, then, full award if the worker is otherwise eligible and has wage credits remaining.

C.R.S. 1973, 8-74-102. Initial determination-prompt payment of benefits. (1) An individual designated by the division of employment, referred to in this article as the "deputy", shall promptly examine the claim and, on the basis of the facts found by him, shall determine whether or not such claim is valid and, if valid, the earliest week with respect to which benefits may commence, if determinable, the weekly benefit amount payable, and the maximum duration thereof.

(2) The deputy shall promptly notify the claimant and any other interested party of the decision, including the earliest week with respect to which benefits may commence, the weekly benefit amount and the maximum duration thereof, and the reasons for the decision. The deputy, for good cause, may reconsider his decision and, if his original decision is amended, shall promptly notify the claimant and such other interested parties of his amended decision and the reasons therefor. Unless the claimant or any such interested parties, within eleven calendar days after either the delivery of the deputy's notification or after such notification was mailed to his last known address, whichever occurs first, files an appeal from such decision, such decision shall be final, and benefits shall be paid or denied in accordance therewith. A mailed notice shall be deemed served on the date of mailing. If an appeal is duly filed, the division shall give notice thereof to the parties entitled to notice of the original determination.

(3) Notwithstanding any other provision of this article, benefits shall be paid promptly in accordance with a determination or redetermination under this article upon issuance of such determination, redetermination, or decision, as the case may be, regardless of any appeal or petition to review which may have been taken from such determination, redetermination, or decision has been modified or reversed by a subsequent redetermination or decision, in which event benefits shall be paid or denied for those weeks of unemployment which occur thereafter in accordance with such modifying or reversing redetermination or decision, but, if such decision is finally reversed, no employer's experience rating account shall be charged with benefits so paid.

8-74-104. Appeals. Unless an appeal is withdrawn, a referee, after affording the parties reasonable opportunity for fair hearing, shall affirm or modify the findings of fact and decision of the deputy. If an appeal involves a question as to whether services were performed by a claimant in employment or for an employer, the referee shall give special notice of such issue and of the pendency of the appeal to the employing unit and to the division, both of whom shall thenceforth be parties to the proceeding and be afforded a reasonable opportunity to adduce evidence bearing on such issue. The parties shall be duly notified of such referee's decision together with his reasons therefor, which shall be deemed to be the final decision of the division unless, within eleven days after the date of notification or mailing of such decision, further appeal is initiated pursuant to section 8-74-105.

8-74-105. Commission review. The commission on its own motion may affirm, modify, or set aside any decision of a referee on the basis of the evidence previously submitted in such case or direct the taking of additional evidence. The commission shall permit any of the parties to initiate further appeals before it. The commission shall permit such further appeal by the deputy if the decision of the deputy has been overruled or modified by a referee. The commission may remove to itself or transfer to another referee the proceedings on any claim pending before a referee. Any

proceeding so removed to the commission shall be heard in accordance with the requirements of section 8-74-104 by the commission or, in the absence or disqualification of a partisan member, by the impartial member acting alone. The commission shall promptly notify the interested parties of its findings and decision.

8-74-108. Appeal to courts. (1) Any decision of the commission shall be final unless a petition to review same is filed by an interested party. Every petition for review shall be in writing and shall specify in detail the particular errors and objections. The petition must be filed within ten days after the entry of the decision of the commission unless further time is granted by the commission within said ten days, and, unless so filed, said decision shall be final. All parties in interest shall be given due notice of any decision of the commission, and said period of ten days shall begin to run only after such notice, and the mailing of a copy of the said decision addressed to the last known address of any party in interest shall be sufficient notice.

(2) No action, proceeding, or suit to set aside, vacate, or amend any findings or decision of the commission, or to enjoin the enforcement thereof, shall be brought unless the plaintiff has first applied to the commission for a review as provided in section 8-74-105.

8-74-109. Court review. Such action, proceeding, or suit must be commenced within twenty days after the final findings or decision of the commission, and any party aggrieved thereby may secure judicial review thereof by commencing an action in the court of appeals for the review of the commission's findings or decision in the same manner as reviews are now provided by law in workmen's compensation cases. The commission, in its discretion, may also certify to such court questions of law involved in any of its decisions. In any judicial proceeding under this article, the findings of the commission as to the facts, if supported by substantial evidence and in absence of fraud, shall be conclusive. Such actions and the questions so certified shall be heard in a summary manner and shall be given precedence over all other civil cases except cases arising under the "Workmen's Compensation Act

of Colorado". If the supreme court reviews the judgment of the court of appeals, such review shall be limited to a summary review of questions of law. Any such action shall be advanced upon the calendar of the supreme court, and a final decision shall be rendered within sixty days after the supreme court grants further appellate review.

Title VII of the Civil Rights Act of 1964 (in relevant part)

42 U.S.C., § 2000e-5. (b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission,

its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

CERTIFICATE OF SERVICE

I hereby certify that I have in compliance with United States Supreme Court Rule 33, para. 3(b) this 5th day of Nov., 1975, deposited three copies of the foregoing Petition for Writ of Certiorari in the United States Mails, first class postage prepaid and addressed to:

Mr. Bruce Craig
Attorney at Law
First National Bank Building
Colorado Springs, Colorado 80902

Mary J. Mullarkey